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No. 8.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

ANNA R. KEAN et al.,
Plaintiffs in Error,

vs.

THE CALUMET CANAL AND IMPROVEMENT COMPANY,
Defendant in Error.

Error to the Supreme Court of Indiana.

BRIEF FOR DEFENDANT IN ERROR, ON RE-ARGUMENT.

FREDERICK S. WINSTON,
SILAS H. STRAWN,
FOR DEFENDANT IN ERROR.

THE GUNTHORP-WARREN PRINTING CO., 118 RANDOLPH ST., CHICAGO.

IN THE

Supreme Court of the United States.

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ANNA R. KEAN et al., *Plaintiffs in Error,* vs. **THE CALUMET CANAL AND IMPROVEMENT COMPANY,** *Defendant in Error.*	Error to the Supreme Court of Indiana.

STATEMENT.

MAY IT PLEASE THE COURT:

This action was brought by defendant in error in the Circuit Court for the County of Lake in the State of Indiana, to quiet title to certain lands.

The complaint included a large number of acres of land owned by the defendant in error, the title to which is in no way involved in this controversy, and in which the plaintiffs in error disclaimed any interest. The controversy between the plaintiffs in error and the defendant in error involves but a very small portion of the property included in the decree entered by the Indiana court.

The facts presented by the record in this case are so

concisely stated in the opinion rendered by the Supreme Court of Indiana (150 Ind. Rep., 699) that we will adopt that opinion as a part of our statement. It is as follows:

> "This was an action brought by appellee against appellants and others to quiet title to certain real estate described in the complaint, and situated in S. ½ section 18, and section 19, township 37 N., range 9 W., and in sections 12, 13 and 24, township 37 N., range 10 W., in Lake County. The lands in controversy, together with other lands, were conveyed to the State of Indiana by the United States under the Swamp Land act of 1850, and by the descriptions of the government survey of 1834. By the same descriptions the lands were conveyed by the state to the remote grantors of appellee. Part of the lands are included in what was once the bed of Wolf Lake and the bed of Lake George, but since the survey the waters have, in large measure, receded, leaving the lake beds comparatively dry land.
>
> "In 1875 certain persons, under the assumption that the beds of the lakes had not been surveyed in 1834, procured a resurvey of that part of the lands formerly covered by the waters, and it is through this last survey and the sales made in pursuance thereof that appellants claim title.
>
> "The case before us, therefore, in so far as concerns source of title, does not differ from that of *Kean* v. *Roby,* 145 Ind., 221; 42 N. E., 1011. On the authority of the decision in that case, there can be no question that the resurvey of 1875, as also the sales made thereunder, was wholly invalid, and consequently that appellee's title as based upon the original survey of 1834, and the sales made under that survey, is good. No real distinction in this regard has been shown between the two cases.
>
> "The second contention is that the action is barred by the fifteen and twenty years' statute of limitations. This contention is plainly founded upon the same theory as the first, namely, that the appellants obtained some title or took possession of some kind under the void survey of 1875. As to title, as we have

seen, there was none. As to possession, the court heard the evidence and did not find, nor can we perceive, that the continuous and lawful possession of appellee and its immediate and remote grantors was ever broken by the unauthorized entrance, if any there was on the part of appellants, or any of them. Appellee and its grantors continued to pay the taxes assessed on the lands, by the descriptions in their deeds coming down from the original government survey, and had at all times such possession of and exercised such dominion over the territory as was possible in the case of wild, wet and uncultivated lands. As said by this court in *Worthley* v. *Burbanks,* 146 Ind., 534; 45 N. E., 779, it is manifest that as to adverse possession there can be no absolutely unvarying rule with reference to every kind of real estate. The requirement as to the kind of occupancy of or dominion over land which is necessary to show adverse possession in the case of a cultivated farm, a town lot, or a residence in a populous city, may be quite inapplicable or even impossible in the case of a piece of desert land, or mining claim, a non-navigable lake, a prairie or a forest. The evidence in this case, as we think, was sufficient to show continuous possession by appellee and its grantors of the lands in controversy."

The case of *Kean* v. *Roby,* referred to in the above opinion, is reported in 145 Indiana, page 221. The facts involved in the case at bar are substantially set forth at greater length in *Kean* v. *Roby.*

That was an action brought by Kean, plaintiff in error in this case, against Roby and others, to quiet title to certain lots in section 12, township 37, being one of the sections involved in the case at bar. The appellees in that case claimed title under the original government survey of 1834, and the court found that townships 37 and 38 in range 10 west, in which the land was situated, were originally surveyed in 1834, under the authority of the United States Land Department, as shown by the field notes and

plats made a part of the record. These townships are both fractional, lying next to the state line dividing Indiana from Illinois, and are in part covered by a body of water known as Wolf Lake. Appellees claimed that title to all the land passed from the General Government to the State of Indiana by the Swamp Land act of September 28, 1850. The patent from the United States bore date March 24, 1853, and is the same patent which included the lands involved in this case.

The appellant contended that the bed of Wolf Lake covering part of the sections above described as aforesaid was not surveyed in the original survey of 1834 and showed that on representations to that effect made to the Land Department of the United States, the Commissioner of the General Land Office ordered a resurvey of the land within the meander lines of the lake, which resurvey was made in 1875. Appellant further claimed that on such resurvey by the Land Department the lots in the lake bed became subject to entry and sale and subject also to the right of appellants' remote grantors to locate "Sioux half-breed scrip" thereon, and she traced her title from patents issued for said lots to such remote grantors upon such location of "Sioux half-breed scrip." Appellees, on the other hand, contended that all the fractional sections, including the bed of Wolf Lake, were surveyed in 1834, so that rightfully the Government had no such lands to survey or sell when the order for the survey of 1875 was made and the land in question attempted to be resold by the Land Department.

The question, therefore, was, as in the case at bar, that if the lands in controversy were in fact surveyed in 1834 and sold by the United States under such survey, then it is clear that the Government had no authority or power to re-

survey the lands in 1875, or to sell them over again, and the appellant's title must fail.

The court found, after a careful review of the evidence, that *as a matter of fact* in the original survey of 1834 both townships in question and all the sections were fully surveyed, including the bed of Wolf Lake; that the lines of the survey of 1834 extended over both land and water, and that the United States conveyed to the State of Indiana the entire fractional townships so surveyed. That all the territory in question in the two townships, including that covered by Wolf Lake, as well as the comparatively dry land upon its borders, having passed to the State of Indiana from the United States, by the Swamp Land act of 1850 and the patents issued to the state therefor in 1853, no land in said townships remained, whether under Wolf Lake or elsewhere, which could be resurveyed or resold by the United States. That the resurvey of 1875, and the sales thereunder, were nullities, and that the appellant therefore had no title to the lands claimed by her. The court cited with approval *Tolleston Club* v. *State,* 141 Ind., 197, hereinafter referred to.

Thus we have, in the case at bar, a finding by the State Court, *as a matter of fact,* that all of the land in controversy here, whether it was at the time of the survey in 1834-35 upland or in the beds of Wolf Lake or Lake George, was included in that survey. That the Federal Government pursuant to the Swamp Act of 1850 by its patent of 1853 conveyed all of its interest therein to the State of Indiana, which in turn conveyed by the same description, all the land here in dispute to the remote grantors of defendant in error.

Plaintiffs in error insist, *first,* that their title to lands

in Wolf Lake and Lake George claimed to have been acquired by them under the survey of 1875, is superior to the title of the defendant in error based upon the original survey of 1834, and, *second,* that this action of defendant in error is barred by the Statute of Limitations of the State of Indiana.

In reply to these propositions we maintain:

First. That the Supreme Court of Indiana having found *as a matter of fact* that all of the lands here involved were included in the survey of 1834-35, this court will not review that question.

Second. That the United States having by its patent of 1853, pursuant to the Swamp Act of 1850, conveyed its interest in all of said land to the State of Indiana, and the said State having conveyed the land, by the same descriptions used in its patent from the United States, to the remote grantors of defendant in error, neither the United States nor the State of Indiana had in 1875 any interest whatever in any of the lands. Therefore the survey of 1875 was absolutely void; the Land Department was without jurisdiction to order such survey and conveyances thereunder, and such proceedings did not in any way affect the title of defendant in error to the land in question.

Third. That the determination of how far the title of a riparian owner extends is one of local law, and the decisions of the State Court upon this question are binding upon this court.

Fourth. That the law of Indiana is that the owner of land bordering on a surveyed non-navigable inland lake, such as the lakes described in this case, takes title to all the land contained within the subdivision. That is to say, he takes as a riparian owner, his title includes and he owns

the land beneath the lake far enough beyond the meandered line and water's edge to make out the full subdivision in which the land is situated.

Fifth. That if the common law of Indiana were as stated by this court in *Hardin* v. *Jordan,* to be the common law of Illinois,—that under a grant of land bordering on a non-navigable lake, the grantee takes to the center of the lake—even then, the defendant in error, by virtue of its ownership of the bordering lands, owns to the center of the lakes and consequently all of the land in controversy. That upon any theory or under any rule governing the rights of riparian owners, the survey of 1875 is void as to the defendant in error, and it could not thereby be deprived of its property.

Sixth. That the question of whether the defendant in error complied with the Statute of Limitations of the State of Indiana is a question of fact, upon which the decision of the State Court is final.

ARGUMENT.

I.

THE SUPREME COURT OF INDIANA, HAVING HELD THAT ALL OF THE LAND INVOLVED IN THIS SUIT WAS IN FACT INCLUDED IN THE SURVEY OF 1834-35, THIS COURT WILL NOT DISTURB THAT FINDING OF FACT.

Gardner v. *Bonestell,* 180 U. S., 362 (370).
Egan v. *Hart,* 165 U. S., 188.
Dower v. *Richards,* 151 U. S., 658.
Hedrick v. *A. T. & S. F. R. R.,* 167 U. S., 673 (677).
Republican River Bridge Co. v. *Kansas Pac. R. R.,* 92 U. S., 315.

The Supreme Court of Indiana, not only in the opinion in the case at bar, but also in the opinion of *Kean* v. *Roby,* 145 Ind., 221, *supra,* has held, *as a matter of fact,* that all of the land in question was surveyed by the Federal Government in 1834-35. In *Kean* v. *Roby* the court discusses the evidence upon which that finding is made.

Whether or not the survey of 1834-35 included all of the sections, portions of which were then in the beds of Lake George and Wolf Lake, is a question of fact deducible from the evidence introduced on the trial. That fact, having been found adversely to the claim of plaintiffs in error by the State Court, is conclusive and this court will not disturb the finding.

A case very similar to the case at bar upon this point is *Gardner* v. *Bonestell, supra.* There this court held:

"The trial court, in addition to its findings in refer-

ence to the proceedings in the Land Department, found as independent matter of fact that the land in controvery was outside the exterior boundaries of the grant, and that Throckmorton was not a *bona fide* purchaser. The Supreme Court of the State sustained those findings. Now in proceedings of this court to review the action of state courts, we do not enter into a consideration of questions of fact. We accept the determination of those courts in such matters as conclusive, and inquire simply whether there have been errors of law." (Citing cases.)

II.

ALL OF THE LAND IN QUESTION HAVING BEEN INCLUDED IN THE SURVEY OF 1834-35, THE UNITED STATES HAVING CONVEYED IT ALL UNDER THAT SURVEY TO THE STATE OF INDIANA IN 1853, AND DEFENDANT IN ERROR HOLDING UNDER MESNE CONVEYANCES FROM THE STATE, BY THE SAME DESCRIPTION, THE SURVEY OF 1875 WAS VOID, AND PLAINTIFFS IN ERROR ACQUIRED NO RIGHTS THEREUNDER.

This has been expressly held by the Supreme Court of Indiana in the following cases, respecting the lakes here in question:

Kean v. *Calumet Canal & Improvement Co.*, 150 Ind., 699.

Kean v. *Robey*, 145 Ind., 221.

Following

Tolleston v. *State*, 141 Ind., 197.

And by this court in

Hardin v. *Jordan*, 140 U. S., 371; and
Mitchell v. *Smale*, 140 U. S., 406.

We have, in our statement, referred to the opinions of the

Supreme Court of Indiana in the case at bar, and in the Roby case. The language of those opinions is clear and decisive upon the proposition above stated.

We now turn to the opinions of this Honorable Court in *Hardin* v. *Jordan* and *Mitchell* v. *Smale.*

In the *Hardin case,* at page 400 of the opinion, we find this language:

> "A question is made with regard to the effect of the proceedings which took place before the register and receiver of the local land office, and by appeal, before the Commissioner of the General Land Office and the Secretary of the Interior, in relation to the rights of the Government to survey and grant the lands under Wolf Lake in 1874. Both Hardin and DeWitt were notified of said proceedings and appeared and contested the same; but the decision was against them and in favor of the Government. It is contended that by this decision the question became *res judicata*, and that Hardin and DeWitt and those claiming under them are bound thereby. It is very true that the decisions of the Land Department on matters of fact within its jurisdiction, made in due course of administration, cannot be called in question collaterally. But, as was declared in the recent case of *Davis* v. *Wiebold,* 139 U. S., 507, decided at the present term of this court, 'if the lands patented were not at the time public property, *having been previously disposed of,* or no provision had been made for their sale or other disposition, or they had been reserved from sale, the Department had no jurisdiction to transfer the lands, and their attempted conveyance by patent is inoperative and void.' So that, if the lands had been 'previously disposed of,' the Department has no jurisdiction over them; and the question whether they have, or have not, been previously disposed of is a judicial question, and not determinable by the Executive Department, except for the purpose of governing its own conduct in the administration of its functions. The same principle is involved in *Moore* v. *Robbins,* 96 U. S., 530,

533, 534, where it is said by Mr. Justice Miller, speaking for the court: 'With the title passes away all authority or control of the Executive Department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel or annul the instrument which he has made and delivered. If fraud, mistake, error or wrong, has been done, the courts of justice present the only remedy. These courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the Government is the party injured, this is the proper course.' Again, referring to the power of the Secretary of the Interior after patent, it is said: 'He is absolutely without authority. If this were not so the titles derived from the United States, instead of being the safe and assured evidences of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the Land Office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the Government to annul his title.'"

In *Mitchell* v. *Smale,* at page 412 of the opinion, the court said:

"Our general views with regard to the effect of patents granted for lands around the margin of a non-navigable lake, and shown by the plat referred to therein to bind on the lake, were expressed in the preceding case of *Hardin* v. *Jordan,* and need not be repeated here. We think it a great hardship, and one not to be endured, for the Government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often *the* most valuable part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession

under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation which ought not to be created or sanctioned. The pretense for making such surveys, arising from the fact that strips and tongues of land are found to project into the water beyond the meander line run for the purpose of getting its general contour, and of measuring the quantity to be paid for, will always exist, since such irregular projections do always, or in most cases, exist. The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which by its exclusions and inclusions of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream. The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream. Such lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the description or boundary of the premises conveyed, and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water, regularly follow.

"We do not mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake or be guilty of a palpable fraud, in which case the Government would have the right to recall the survey, and have it corrected by the courts or in some other way. Cases have happened in which, by mistake, the meander line described by a surveyor in the field-notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the Government. Nor do we mean to say

> that in granting lands bordering on a non-navigable lake or stream the authorities might not formerly, by express words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other parties. But since the grant to the respective States of all swamp and overflowed lands therein this cannot be done."

Although dissenting opinions were filed in the two cases last cited, there seems to have been no difference of opinion in this court as to the correctness of the law as enunciated in the above quotations.

It should be borne in mind that the facts in the case at bar are much more favorable to the defendant in error than were the facts in the *Hardin* and *Mitchell* cases to the prevailing party in those cases. Here we have a finding by the Supreme Court of Indiana that, as a matter of fact, all the land in question, whether in the bed of the lakes or elsewhere, was actually surveyed in 1834-35. More than that, the defendant in error in our case holds under a patent from the Federal Government all the land in question, made pursuant to and after the passage of the Swamp Act in 1850, while Hardin holds under a patent issued by the government in 1841, prior to the passage of the Swamp Act.

In our case, also, there is no question of any interest of the State or of the United States in and to the land in question. And that is just as true with respect to the land in the beds of Wolf Lake and Lake George as it is with respect to the upland.

The contention of plaintiffs in error is disposed of in the two cases above quoted.

On this point see further,

Moore v. *Robbins,* 96 U. S., 530.

Smelting Co. v. *Kenp,* 104 U. S., 640.
Wright v. *Roseberry,* 121 U. S., 488.
Doolan v. *Carr,* 125 U. S., 618.

We therefore say that the cases cited by the plaintiffs in error, upon the proposition that the decision of the Secretary of the Interior is *res adjudicata,* are not in point.

III.

THE RIGHTS OF THE OWNERS OF LAND BORDERING ON INLAND, NON-NAVIGABLE LAKES ARE SETTLED BY THE LAW OF THE STATE WHEREIN THE LAND LIES.

This principle has been so frequently laid down by this court that we believe any extended comment superfluous. Notwithstanding the difference of opinion in the *Hardin* and *Mitchell* cases upon other points, the court has always been unanimous on this question.

In *Hardin* v. *Jordan,* at page 380 of the opinion, the court said:

> "Such being the form of the title granted by the United States to the plaintiff's ancestor, the question is as to the effect of that title in reference to the lake and the bed of the lake in front of the lands actually described in the grant. This question must be decided by some rule of law and no rule of law can be resorted to for the purpose except the local law of the State of Illinois. If the boundary of the land granted had been a fresh-water river, there can be no doubt that the effect of the grant would have been such as is given to such grants by the law of the State, extending either to the margin or center of the stream, according to the rules of that law.
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> * * * * *
>
> "We do not think it necessary to discuss this point further. In our judgment the grants of the Govern-

ment for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie."

Since the decisions in the *Hardin* and *Mitchell* cases this court has repeatedly reaffirmed that doctrine, particularly in the cases of

Lowndes v. *Huntington*, 153 U. S., 1 (19).
Grand Rapids & Indiana R. R. Co. v. *Butler*, 159 U. S., 87.
Water Power Co. v. *Water Commissioners*, 168 U. S., 349 (363).

IV.

WHAT THEN IS THE LAW OF THE STATE OF INDIANA RESPECTING NON-NAVIGABLE LAKES, AND PARTICULARLY RESPECTING WOLF LAKE AND LAKE GEORGE?

In *Ross et al.* v. *Faust et al.*, 54 Ind., 471, decided in 1876, the court held that the title of riparian proprietors on White River, in said State, extended to the thread of the stream, regardless of the facts that the survey lines of the United States surveyors meandered the banks and did not include the bed thereof, and that such bed was not, in terms, sold to, nor paid for by, purchasers of the lands bordering on such river.

The court said (p. 476):

"But it is claimed that the surveyor made a mistake, and meandered the banks, and failed to survey the bed of a non-navigable stream and that, hence, its bed was not bought and paid for and did not pass to the purchasers of the bordering lands.

This proposition assumes, as a legal principle, that the bed of a stream cannot pass to the purchaser of the

adjoining land unless it is included in the survey and paid for. This is begging the question.

We have already seen, above, that, as to lands bordering on rivers actually navigable, the beds of which, by law, were not to be surveyed and paid for, it is not well settled that the common law does not apply and carry the title of the riparian purchaser to the thread of the stream."

And further (p. 478) the court said:

"Public policy, as has been already said, dictates the private ownership of the bed of non-navigable rivers.

The facts, then, that the bed of the river was not surveyed nor paid for, do not, necessarily, exclude it from the ownership of the adjoining proprietors; and as to the fact, if it be so, that it was not paid for, we may observe that it is a circumstance of little importance. The Government was not selling her public lands for the purpose of making money. She did not sell them for their value. She was selling them for an almost nominal price, a dollar and a quarter an acre—enough to cover the cost of survey and sale, possibly a little more. Her object was to induce the settlement in the country of a hardy, land-owning people. Her surveys of the whole were more or less inaccurate. We know, as a matter of general knowledge, that often sections exceed and often fall short of the quantity paid for, to a greater extent than was produced by the mistake of the surveyor, in this case, touching the fact of the navigableness of the stream. It could have produced a loss of but a very few dollars. On the other hand, we have the clearly expressed intention of the grantor, expressed by a solemn legislative enactment, that the title should pass, to the thread of the stream.

And the mistake of the surveyor is not one occasioning a loss of such pecuniary amount that it would be regarded as sufficiently affecting the fairness of a private contract, to violate it. We think the title of riparian proprietors on White River, in Marion County, Indiana, extends to the thread of the stream, notwithstanding the bed of the stream was not surveyed

by the United States surveyor, nor, in terms, sold to purchasers of the bordering lands."

In *Ridgway et al.* v. *Ludlow*, 58 Ind., 248, decided in 1877, one of the questions for decision was, whether the owner of lands bordering on the margin of a non-navigable lake, by virtue of such ownership, was also the owner of the land extending under the water, to the thread, or a line along the middle of the lake. The court said, in deciding the question, that the ruling in *Ross* v. *Faust, supra,* governed, and that it could see no difference in principle, whether the rule applied to non-navigable rivers or non-navigable lakes, *when they are within the congressional surveys;* and that the owner of the land bordering on a non-navigable lake, *lying within the congressional survey,* is the owner of the bed of the lake, to the thread thereof.

In *Edwards* v. *Ogle*, 76 Ind., 302, decided in 1881, a pond, as well as its margins, had been originally surveyed as public land. The appellant claimed that, inasmuch as his tract of thirty-nine acres bordered on the marshy pond, his title extended to the center of the pond, and was not confined to the boundary defined by the survey.

The court held that a purchaser of land bordering on non-navigable water could not maintain a claim of title to the center of the water, *where such claim would overlap the section lines, as surveyed.* The cases of *Ross* v. *Faust* and *Ridgway* v. *Ludlow, supra,* were commented upon as follows (page 307):

"Counsel for the appellant refer us, in support of their position, to *Ross* v. *Faust,* 54 Ind., 471, and *Ridgway* v. *Ludlow*, 58 Ind., 248; but the facts in those cases differed essentially from those in this case. *Ross* v. *Faust, supra*, involved the question of riparian rights of the owners of land bordering on White River, in Marion County. The bed of the river had not been

surveyed as a part of the public domain, but, on the theory that White River was a navigable stream, the government surveys had been terminated at the margin thereof. It was held that the water course in question was not a navigable river, and that the owners of land on its banks took to the thread of the stream.

"*Ridgway* v. *Ludlow, supra,* presents this state of facts, as we understand them. A lake covered a portion of the southeast quarter of a certain section of land, and the larger portion of the southwest quarter, and extended over into the section adjoining on the west. The survey showed no subdivisions of less than a quarter section. A narrow strip of land extended from east to west between the lake and the south line of the southwest quarter of the section. The west half of this strip had been conveyed by metes and bounds, which carried the northern boundary to the south shore of the lake, but did not mention that as the boundary, and it was held that the deed gave the grantee title to the center of the lake. The case does not state the phraseology of the patent from the United States to the party through whom the claimant derived his title; but there is nothing to indicate that the dry land had been separately surveyed and patented by the Government, nor that, by extending the boundary of the grant to the center of the lake, it would absorb and override the line of any legal subdivision of the quarter section."

State v. *Portsmouth Savings Bank*, 106 Ind., 435, decided in 1886:

This involved Beaver Lake, a body of water covering some 17,000 acres of land, from four to five miles in length, and from two to four miles in width. There was no survey made, nor attempted to be made, of the lake, or any part thereof. The court held that the bed of the lake was not in a condition to be sold, and hence there was no authority to dispose of the same, directly or indirectly. Under the peculiar facts in the case, the court held that a purchaser of land, in surveys bounded by the lake, acquired

no title to the bed. Upon reaching this conclusion, the court made the following reservation:

> "Whether or not this court would, in all cases, as between private parties, apply the doctrine of the above authorities in its strictness, and to its full extent, is a question we need not here determine."

The court also referred to the cases of *Ross* v. *Faust*, *Ridgway* v. *Ludlow*, and *Edwards* v. *Ogle*, *supra*, in the following language:

> "These cases are not controlling here. Neither of them involved swamp lands granted by the State. The first involved the rights of riparian proprietors upon an unnavigable river, and in the others *their rights were limited by the subdivision in which their lands were situated.* We decide nothing here in conflict with those cases, nor do we, by anything that is said in the case before us, intend to either extend or limit those cases."

In referring to the decision in the Beaver Lake case, the Supreme Court of Indiana, in *Kean* v. *Robey*, *supra*, holds:

> "The other objection made is that, in the Beaver Lake case, *State* v. *Portsmouth Savings Bank*, 106 Ind., 435, this court decided that the sale of the border lots on Beaver Lake, under the original government survey, did not carry title to the lands covered by the waters of the lake. The case is not in point, for the very good reason that, in the Beaver Lake case, the lands under the lake were not surveyed; the survey ceased at the borders of the lake. In the case of Wolf Lake, however, as we have seen, the lake itself was included in the survey; the section lines passed over and included the waters, as well as the land. Had Beaver Lake been actually surveyed as Wolf Lake was, the matter would be different; as it is, that case is not in point. The case at bar is ruled by the *Tolleston Club case, supra.*"

In the *Tolleston Club case* (*Tolleston Club of Chicago* v. *State*, 141 Ind., 197), the court said:

> We may here remark that, so far as concerns the marginal lots, the Beaver Lake cases (*State* v. *Portsmouth Savings Bank*, 106 Ind., 435, 7 N. E., 379; *State* v. *Milk*, 11 Biss., 197, 11 Fed., 389, are not in point. Beaver Lake was a large body of water of shallow depth, which had not been surveyed by the United States Government."

Another case involving the title to Beaver Lake is that of *State of Indiana* v. *Milk*, decided by the late Judge Gresham, sitting as circuit judge in the Federal Court for the Northern District of Indiana, on April 18, 1882, and reported in the 11th Federal Reporter, at page 389.

In that case the court held the rule to be that, while a general grant of land on a river or stream, non-navigable, extends the line of the grantee to the middle or thread of the current, a grant to a natural pond or lake extends only to the water's edge.

This court in *Hardin* v. *Jordan*, 140 U. S., 371, commented upon this departure from the common law rule, and, after quoting Judge Gresham's argument, used this language (p. 397 of the opinion):

> "We do not think that this argument *ab inconvenienti* is sufficient to justify an abandonment of the rules of the common law, which, as we have shown, have been adopted in Illinois as the law of the land. It is too much like judicial legislation. It is as much as to say: 'We think the common law might be improved, and we will, therefore, improve it.' As to the supposed difficulty or inconvenience in applying the law, it is no greater than that which occurs on any bay or incurved shore, even of a large river, in adjusting the outgoing boundary lines between adjoining proprietors over the submerged bottoms of flats lying in front of their riparian lands. Just and equitable rules have been adopted for settling the mutual rights of parties in such cases. Where a lake is very long in comparison with its width, the method applied to rivers and

streams would probably be most suitable for adjusting riparian rights in the lake bottom along its sides, and the use of converging lines would only be required at its two ends. But whatever mode of determining the outgoing lines, as between adjoining owners, should be adopted in special cases (which may be left for determination when they arise) there can be no difficulty in the present case as between the plaintiff and the defendant. The latter is not an adjoining owner. The controversy here is between a riparian owner and a party claiming the lands under water in front of him; and as between them, we think there is no question as to the riparian owner's right."

Stoner v. *Rice, State Auditor*, 121 Ind., 51, was decided in 1889. The facts are nearly identical with those in the case at bar. The appellant was the owner of three lots bordering upon a non-navigable lake, having derived his title by mesne conveyances from the United States. By virtue of such conveyances and ownership he claimed to own the land beneath the water of the lake. Appellee contended that the appellant, by such conveyances, only acquired title to the dry land; that the meander line around the border of the lake constituted the border line of appellant's land. Acting upon that theory, appellee, in the year 1884, procured a survey of the lake within the meander line to be made by the General Government, and platted the same. Such survey and plat were made by the Commissioner of the General Land Office, who was also *ex-officio* Surveyor General of Indiana, and the same was adopted and approved by the Secretary of the Interior. Appellee also procured a patent to be issued by the United States to the State of Indiana for the same March 17, 1885.

The court held that the owners of lands bordering on non-navigable inland lakes, such as the one described in the

case, when the subdivisions of the land are surveyed by running a meander line between the dry land and the water to ascertain the number of acres of dry land, and designating such subdivision as a fractional quarter or a lot, giving the number of acres of dry land, takes the title to all the land contained within the subdivision; that is to say, he takes as a riparian owner, and his title includes and he owns the land beneath the lake far enough beyond the meandered line and water's edge to make out the full subdivision in which his land is so situated.

It was contended that the riparian owner bordering on a non-navigable lake, like a river, took to the thread or center of the lake. This rule was held to be impracticable when applied to lakes, the court saying:

> "Suppose the lake to be round, or nearly so, with riparian owners, as there would be, on the north, south, east and west of it, this rule could not be applied; while the rule we have laid down is practicable, and we think that the proper rule to be applied in cases of this character. To hold that the meandered line constitutes the boundary would be against the great weight of authority. Indeed, the authorities are almost unanimous against such a doctrine. The weight of recent authorities is to the effect that the owner of the bank owns to the center of the body of non-navigable water, at least, whether it be a lake or river, and that, as a lake generally dries up, the owners of the banks become the owners of the bed, each to the center thereof; but we are unable to find a case parallel with the one under consideration, or where the doctrine has been applied to a lake like the one in question, or many of the lakes within this state. * * * *The true doctrine to apply, in the disposition of such land as is covered by the body of such lakes, we think is that the government in making surveys included in such survey all the land within the district surveyed, and if there was a lake or large pond, which covered a part of a subdivision, it was meandered out, and the*

dry land in such subdivision designated as a fractional subdivision or lot; that in the purchase of such fractional subdivision or lot the purchaser took title to it as a riparian owner, with the right to the land, as the water receded, within the boundary lines of the subdivisions conveyed to the purchaser. In other words, the purchaser acquired title to all the land within the subdivision, though it was described as a fractional subdivision or lot. The authorized survey divided all the land within the district into subdivisions, and if, by reason of water upon a tract of the land, a portion of it was regarded at the time as worthless and unsalable, there was a meander line run to ascertain the amount of dry land, and such subdivision was designated as fractional subdivision or lot, and, although thus described, the sale passed title to the whole subdivision."

In *Brophy* v. *Richeson,* 137 Ind., 114, decided February 13, 1894, a patent of land covered "the S. E. Fr. Qr. Sec. 21, * * * containing 95.31 acres," and the patentee conveyed the land by the same description. The plat of the original government survey thereof showed that the 95.31 acres lay north and east of the meander line of Cicott Lake, and that south of the lake, and lying between it and the south line of the quarter section, was a small projection of land, containing .98 acre. The Supreme Court of Indiana, following *Stoner* v. *Rice,* held that the patentee's grantee acquired title to the whole quarter-section, including the portion covered by the lake and .98 acre south of the lake.

In *Tolleston Club of Chicago* v. *State,* 141 Ind., 197, decided in 1894, the court held that where, under a patent from the United States, the State acquires title to a section of land partly within and partly without the meander line, and the dry land without the meander line is divided into lots, and there is nothing to indicate that it was intended to bound the lots by such meander line, a patent

from the State of one of the lots, describing it by number and section, conveys the whole thereof to the opposite section line.

In that case an application for rehearing was made, and denied. In denying the rehearing the court went again somewhat elaborately into the facts, and reaffirmed its previous decision. This was followed by *Tolleston Club of Chicago* v. *Clough,* 146 Ind., 93, decided in 1896.

The law of Indiana, as laid down by the cases hereinabove referred to was reaffirmed by the decision of the Supreme Court of that State in the case of *Kean* v. *Roby,* 145 Ind., 221, decided in 1896, and in the case at bar, decided in 1898, which we have already noticed.

We therefore submit that it is the settled law in the State of Indiana that, where an inland, non-navigable lake covers a subdivision of land, and the government survey designates the dry land in such subdivision as a fractional subdivision, or lot, the purchaser from the government of such subdivision or lot takes the title to all that portion of the bed of the lake contained within the subdivision. That is to say, he takes as a riparian owner, his title includes, and he owns, the land beneath the lake far enough beyond the meander line and water's edge to make out the full subdivision in which his land is so situated.

But, even if there were any inconsistency in the several opinions of the Supreme Court of the State of Indiana, respecting the rights of riparian owners, and especially respecting the rights of the defendant in error in this case, in and to the property in controversy, we submit that this court, under its well settled rule, must follow the latest settled adjudication of the Supreme Court of the State in preference to the earlier ones.

There can be no question that the Supreme Court of Indiana expressly decided in this case, that the defendant in error owns, under the law of the State of Indiana, all of the property in controversy in this suit, as shown by the decree entered herein. The decision in this case is the latest expression of the Supreme Court of that State, and is in no sense *dictum*.

In *Wade* v. *Travis County*, 174 U. S., 499, this court held that:

> "If there be any inconsistency in the several opinions of a state court, the general rule is that this court will follow the latest settled adjudications, in preference to the earlier ones."

See, also,

Leffingwell v. *Warren*, 2 Black, 599.
Fairfield v. *Gallatin County*, 100 U. S., 47.

V.

IF THE COMMON LAW OF INDIANA WERE AS FOUND BY THIS COURT, IN HARDIN V. JORDAN, TO BE THE COMMON LAW OF ILLINOIS, THEN THE DEFENDANT IN ERROR, AS A RIPARIAN OWNER OF BORDERING LANDS, OWNS TO THE CENTER OF THE LAKES, AND, CONSEQUENTLY, ALL OF THE LAND IN CONTROVERSY.

For the sake of the argument, let us assume, contrary to the fact, that the survey made in 1834-35 of Township 37 North, Range 9, and Township 37 North, Range 10, did not include Wolf Lake and Lake George. Then we submit that, under the rule of the common law, as stated by this court in *Hardin* v. *Jordan*, defendant in error, as the owner of the land bordering on these lakes, would take to the center thereof.

The case of *Forsyth* v. *Smale et al.*, 7 Biss., 201, decided by Judge Drummond, sitting in the Circuit Court, for the District of Indiana, in May, 1876, was brought by one of the remote grantors of the defendant in error against John Smale, the husband of Sarah Smale, one of the plaintiffs in error in the case at bar. It was an action in ejectment respecting Lots 3 and 4, being the South half of Section 18, Township 37 N., R. 9, a part of the property in this suit. The decision was on the demurrer to the complaint, and, consequently, the question of whether or not the survey of 1834-35 had, as a matter of fact, been extended across Lake George was not gone into.

The court, however, decided that, in relation to a non-navigable lake, the law has always been that the purchaser takes the land to the center of the stream.

The court (p. 206 of the opinion), said:

> "We do not say but that circumstances might change the principle applicable to such a case as this, but if it be true, as we have the right to assume upon the pleadings that it may be or is, that the physical condition of this lake has not substantially changed between the time of the survey and the time when this suit was commenced, then it seems clear that the plaintiffs, in obtaining the titles to Lots 3 and 4, would have the right to include within the boundary of their land, as that which was sold by the government, all of the extension into the lake.
>
> Whether or not this was the effect of a gradual accretion upon the land, or of some sudden cause, all we can judge from is the facts as they appear from the pleadings. As this lake is only three-quarters of a mile wide, it may be doubtful whether the same rule ought to be applicable to this case as to a larger lake, which, owing to the cultivation of the country, or other cause, might dry up gradually or suddenly. For example: the plaintiffs, being the owners of all the lands on the east and west and southern boundaries of this lake

(*that is true of the defendant in error in the case at bar*), suppose that there is a gradual withdrawal of the lake, and the bed of the lake bordering upon plaintiffs' land should become dry land, what is to prevent the principle of accretion from operating in such a case as this, where the lake is only three-quarters of a mile wide? Ought there to be any difference in this case from that of a non-navigable stream, so-called? Is is not within the spirit of the acts of Congress? Whether that would be true of a large body of water, where the water gradually or suddenly retired, is not necessary to decide. It might be supposed in such case that the government did not intend to convey the land covered by the water, but that perhaps is not necessary to be decided in this case. Neither do I feel inclined to decide absolutely as to the rights of the parties in this case.

It may be that if the facts were all known to us, if the changes which had occurred since the time of the survey and the sale and the time when this suit was brought were known, we might take a different view of the case. But, as far as we can at present see, there seems to be no reason for taking this case out of the general rule, where land is purchased bordering upon a non-navigable stream, and where the line is meandered upon the stream for the purpose of quantity, and the stream is intended as the boundary of the land. The uniform rule as to the description of lands in deeds is that the great natural object is to govern, and courses and distances are to yield to the object. The great natural object here was the lake, or the water, and the plat shows that the western line of Lots 3 and 4 was intended to be the water, and we conclude that the government did not intend to exclude from the operation of the grant which was made to the purchaser any land between the meandered line and the water, so without actually deciding what may be the ultimate rights of the parties, we must hold that the demurrer is not well taken, and must be overruled."

This case was cited with approval in *Hardin* v. *Jordan*, *supra*.

Applying the common law rule, as indicated in *Forsyth* v. *Smale,* and in the Hardin case, and assuming that the defendant in error owns merely the land bordering on Lake George, and Wolf Lake, as shown by the maps printed herewith, then, under the decision in the above cases and the authorities therein cited, the defendant in error necessarily has title to all of the land claimed by plaintiffs in error in this controversy. A different holding would be wholly unsupported by authority, and would deprive defendant in error of its rights, as a riparian owner.

In the case of *Hardin* v. *Shedd,* reported as *Fuller* v. *Shedd,* in 161 Ill., 462, and now before this Honorable Court for reargument, as No. 56 on the calendar for the present term, involving the title to Wolf Lake, in Illinois, the Supreme Court of Illinois held, with respect to Wolf Lake, that the gradual recession of the waters of the lake has given the riparian proprietors the right to the new land by following the recession of the waters to their edge.

And in passing upon the question, the court said:

> "Where accretions come to such riparian proprietors, they shall take to the water's edge and follow the recession of the waters to their edge. Their lines and bounds are thus determined and are certain. This rule recognizes the riparian proprietor's rights to the fullest extent. The value of his riparian rights is preserved to him. If, as in many such lakes, there is much depth of water on one side, and very shallow on the other, and in process of time the recession of the waters on the shallow side passes beyond the lake's center, the owner on that side still goes to the water's edge, and the proprietor on the other side should not come in between the lake and such proprietor after the waters have receded beyond the center. Where there is depth of water, the lake still exists, and one proprietor is not deprived of the benefit of his riparian rights."

Thus we say that, in the case at bar, on the assumption

that the beds of Wolf Lake and Lake George were not included in the township survey of 1834-35, but that that survey covered only the land bordering those lakes, then, under the principles of the common law, held in the Hardin case, or, under the ruling of the Supreme Court of Illinois in *Fuller* v. *Shedd,* the defendant in error necessarily has title, as riparian owner, to the land here sought to be claimed by the plaintiffs in error. For, in any event, the defendant in error must be secured in its riparian rights.

We quote the language in *Hardin* v. *Jordan* (p. 381), as applicable:

> "It has never been held that the lands under water, in front of such grants, are reserved to the United States, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render the titles uncertain, and to derogate from the value of natural boundaries, like streams and bodies of waters."

VI.

LIMITATIONS.

Counsel for plaintiffs in error would impose upon this court the burden of examining the record to ascertain whether or not the defendant in error in the prosecution of this suit is barred by the Statute of Limitations of the State of Indiana. This was a question of *fact,* which has been decided adversely to the plaintiffs in error, both by the *nisi prius* and the Supreme Courts of the State of Indiana. (See opinion of Supreme Court of Indiana above quoted.)

If this court would go into the record to determine this question, its conclusion must necessarily, we submit, affirm that of the state courts. A jury was waived, the case tried

before the court, and the finding and judgment of the trial court having been affirmed by the State Supreme Court, the question as to whether or not the defendant in error complied with the Statute of Limitations of the State of Indiana cannot be here reviewed. It is not a Federal question.

Gardner v. *Bonestell,* 180 U. S., 362 (370).
River Bridge Co. v. *Kansas Pacific Ry. Co.,* 92 U. S., 315.
Dower v. *Richards,* 151 U. S., 658.
Egan v. *Hart,* 165 U. S., 188.
Hedrick v. *A., T. & S. F. R. R.,* 167 U. S., 673 (677).
Murdoch v. *City of Memphis,* 87 U. S., 590.

Conclusion.

For the convenience of the court, we hereto attach two maps. One is a copy of the original plat of the Government Survey of 1834-35, of Township 37 North, Range 10, and Township 37 North, Range 9, W., including Wolf Lake and Lake George, so far as applicable to this case. The second map is a copy of the foregoing with the uplands of the defendant in error abutting upon these two lakes, as originally conveyed, shaded, and the lines extended across the lakes in accordance with the findings of the Supreme Court of Indiana in *Kean* v. *Roby,* and in the case at bar.

In conclusion, we submit that the Supreme Court of Indiana has *found it to be a fact* that the beds of Wolf Lake and Lake George in Indiana were properly surveyed by the Federal government in 1834-35.

The United States, by patent, conveyed to the State of Indiana the lands in controversy, based upon the survey of 1834-35. In that conveyance the government made no reservations as to the portions of the property described in

the conveyance which were then or are now in the bed of Wolf Lake or of Lake George. This court, as well as the Supreme Court of Indiana, has held that, after the aforesaid conveyance by the Federal government to the State of Indiana, no further title remained in the United States, to be in any way disposed of, and that titles founded on the survey of 1875, under which plaintiffs in error claim, are absolutely void.

This court has repeatedly held that the decisions of the state court are final as to how far the title of a riparian owner extends.

It is the settled law of the State of Indiana that purchasers of the fractional lots or sections from the state, under the survey of 1834-35, took all of the land in said subdivisions, or lots, to the limits of such subdivisions. And this, irrespective of whether the land was or was not covered by water.

Even if there were a conflict in the decisions of the Supreme Court of Indiana on this subject, it is clear that the latest decisions of that court are to this effect, and must therefore govern.

If the law of Indiana upon this proposition does not control, and the case must be decided in accordance with the common law, as laid down by this court in *Hardin* v. *Jordan*, then the defendant in error, as owner of the abutting land, holds the title to the center of the lakes, respectively, and to all the lands in controversy.

We therefore respectfully submit that the judgment of the Supreme Court of Indiana should, in all things, be affirmed.

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